No. 16181

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JESSE LEE ROBINSON and TOM LOWE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division,

ROBERT D. HORNBAKER,
Assistant U. S. Attorney,

600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Statement of Jurisdiction.

The Court found appellants guilty on both counts of a Two-Count Indictment on May 1, 1958 after trial in the United States District Court for the Southern District of California [Tr. 136].[1] Count One charged that on or about November 21, 1957 the appellants did, after importation, knowingly and unlawfully receive, conceal and transport, and facilitate the concealment and transportation of a certain narcotic drug, namely, approximately 150 grains of heroin, in violation of United States Code, Title 21, Section 174. Count Two charged that on or about November 21, 1957 the appellants did, after importation, knowingly and unlawfully sell and facilitate the sale of a certain narcotic drug, namely, approximately 150

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[1]Tr. refers to the Reporter's Transcript of Proceedings; C. Tr. refers to the Clerk's Transcript.

grains of heroin, to Delis Cammack, in violation of United States Code, Title 21, Section 174 [C. Tr. 1]. On June 2, 1958 the Court sentenced appellant LOWE to five years on each count, to run concurrently, and appellant ROBINSON to ten years on each count, to run concurrently [C. Tr. 27-28]. The District Court had jurisdiction under Section 3231, Title 18, United States Code. Appellants filed notice of appeal within the time permitted by law [C. Tr. 37-38]. This Court has jurisdiction under Section 1291, Title 28, United States Code.

I.

The Evidence Should Be Viewed Most Favorably to the Government.

The Court should not weigh the evidence or pass on the credibility of witnesses. Therefore, the convictions should be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.

United States v. Glasser, 315 U. S. 60, 80 (1942);

Dean v. United States, 246 F. 2d 335, 336-337 (8th Cir., 1957);

United States v. Brown, 236 F. 2d 403, 405 (2d Cir., 1956);

Arena v. United States, 226 F. 2d 227, 229 (9th Cir., 1955), cert. den. 350 U. S. 954 (1956);

Schino v. United States, 209 F. 2d 67, 72 (9th Cir., 1953), cert. den. 347 U. S. 937 (1954);

Woodward Laboratories v. United States, 198 F. 2d 995, 998 (9th Cir., 1952);

O'Leary v. United States, 160 F. 2d 333 (9th Cir., 1947).

II.

The Evidence Was Sufficient to Convict Robinson on Count Two.

Taking the view most favorable to the Government, the evidence showed that:

Robinson had been convicted of two narcotics felonies [Tr. 121]. He had sold narcotics to Delis Cammack, the principal Government witness [Tr. 25].

Cammack called Robinson around noon on November 21, 1957. Cammack told Robinson that he "would like to see him and get a half a pint . . ."; Robinson asked him "to . . . come around to his [Robinson's] house" [Tr. 42-46].

Robinson, therefore, knew that "half a pint" meant half an ounce of heroin. *Cf. United States v. Alexander,* 219 F. 2d 225, 227 (7th Cir., 1955), where the Court said:

> "If the defendant were innocent of all guilty knowledge she would wonder what Durham meant when he said he wanted 'to get three shirts.' "

Cammack went to Robinson's house. He had been there before. Robinson told him "the reason he didn't say much on the telephone [was] because a friend of his had been convicted through a telephone conversation." Cammack again said he would like to get half an ounce of heroin. Robinson told him to call Tom Lowe and gave him Lowe's telephone number [Tr. 46-47]. Cammack had known Tom Lowe since July, 1957 [Tr. 130].

Cammack called Robinson a second time around 1:45 P.M. He told Robinson that he had lost Lowe's phone number and asked for it again. Robinson gave it to him. He also said that "he [Robinson] had called Tom and he

wasn't there" [Tr. 48-49]. ROBINSON told Cammack to keep calling because "the stuff was real good stuff" [Tr. 10-11].

Cammack finally reached LOWE about 3:00 P.M. He told him that "JESSE [ROBINSON] had told me to call." Cammack and LOWE then made the deal. LOWE delivered the heroin to Cammack shortly afterward [Tr. 50-52].

Cammack called ROBINSON a third time on November 22nd. Cammack testified as follows:

> "Q. Would you repeat that conversation as you now best recall it? A. I said, 'Hello, J. This is D. C.' He asked me how I was I doing. I said 'O.K.'
>
> * * * * * * * *
>
> After that I told him that I would like to see him and get a pint. So he told me—I asked him if he wanted me 'to do the same as I did yesterday.' So he said, 'Yes, Call Tom Lowe.' I told him 'that was real nice yesterday.' And he said, 'Yes, I know it.' So then I hung up" [Tr. 54-55].

ROBINSON's conviction on the above evidence should be sustained on at least two theories: First, that he "facilitated" the sale. Second, that he "aided, abetted, counseled, commanded, induced and procured" the sale.

The indictment charged that ROBINSON "did knowingly and unlawfully sell and facilitate the sale of a certain narcotic drug, namely, approximately 150 grains of heroin, to Delis Cammack . . ." This Court defined "facilitate" in *Pon Wing Quong v. United States,* 111 F. 2d 751, 756 (9th Cir., 1940). There, the indictment charged appellant in two separate counts with facilitating the transportation and facilitating the concealment of opium. The evidence showed that appellant was an Express Company

employee having access to the customs corral at San Francisco; that a trunk containing opium was delivered to the corral from the S. S. President Coolidge; that appellant took a sticker from a box which had passed customs inspection and placed it on the trunk, knowing that in contained opium. In holding that appellant had facilitated the transportation and concelament, the Court said:

> "With the fact of importation established when the S. S. 'President Coolidge' crossed the three mile limit approaching San Francisco (United States v. Caminata, D. C. Pa., 1912, 194 F. 903, and Fiddelke v. United States, *supra*), the problem of facilitating the transportation after such crossing of the line is presented. After the trunk was landed in the corral it was not actually moved, except by the customs officers, and if actual movement after its arrival in the corral were the requisite for the commission of the crime of facilitating transportation after importation it could not be held to have been committed. However, here the trunk containing the opium was in the act of being transported after importation from the time it left the three mile limit until it reached its intended destination in the United States, to-wit, delivered to the consignee. Anything done to make the continuance of that trip 'less difficult' would constitute facilitation of its transportation. Since the term 'facilitate' seems not have any special legal meaning, the framers of this statute must have had in mind the common and ordinary definition as expressed by a standard dictionary. Quoting from Webster's Unabridged Dictionary, 'facilitate' is defined as follows: 'To make easy or less difficult; to free from difficulty or impediment; as to facilitate the execution of a task.'
>
> "The only reason for the placing of the sticker on the trunk was to permit the trunk and its contents to

pass through the customs without inspection. Certainly this act made the progress of transportation of the trunk 'less difficult' and 'freed it from difficulty or impediment' and in short facilitated transportation. The method of facilitation used was not one of actual physical movement at the moment but rather one related to the continuity of the trunk's present status of being in the course of transportation. * * *

"* * * The act of pasting the sticker upon the trunk was one which concealed the fact that the trunk contained contraband by representing that it had been inspected and was released from customs. Anything done to further the concealment by misleading, or in any other manner avoiding the inspectors from discovering the contents thereof would constitute facilitating the concealment."

The only case cited by appellant, *Morei v. United States,* 127 F. 2d 827 (6th Cir., 1942), is not in point. There, the defendant Platt was charged with the purchase and sale of narcotics. He was not charged with facilitating. Here, the evidence showed that ROBINSON made the sale less difficult. He therefore facilitated the sale.

Section 2(a), Title 18, United States Code, provides that:

"Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

The Supreme Court, in *Nye & Nisson v. United States,* 336 U. S. 613, 618-619 (1949), defined "aid and abet." Said the Court:

"The trial court charged that one 'who aids, abets, counsels, commands, induces, or procures the commission of an act is as responsible for that act as if

> he committed it directly.' That theory is well engrained in the law. See §332 of the Criminal Code, 18 U. S. C. §550, now §2; *United States v. Johnson,* 319 U. S. 503, 518; *United States v. Dotterweich,* 320 U. S. 277, 281. In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.' L. Hand, J., in *United States v. Peoni,* 100 F. 2d 401, 402."

See also:

Periera v. United States, 347 U. S. 1, 11 (1953).

An aider and abettor need not be present when the crime was committed.

Vane v. United States, 254 Fed. 32 (9th Cir., 1919);

Borgia v. United States, 78 F. 2d 550, 555 (9th Cir., 1935);

United Cigar Whelan Stores Corp. v. United States, 113 F. 2d 340, 346 (9th Cir., 1940);

Shockley v. United States, 166 F. 2d 704, 716 (9th Cir., 1948), cert. den. 334 U. S. 850 (1948).

The only case cited by appellant, *Morei v. United States, supra,* is not in point. There, the Court said that "the only thing Dr. Platt did was to give Beach the name of Morei as a man from whom he might secure heroin to dose horses in order to stimulate them in racing" (p. 832). Here, the facts showed that ROBINSON did more than that; he associated himself with the venture. He therefore aided, abetted, counseled, commanded, induced and procured the sale.

III.

The Court Need Not Inquire Into the Sufficiency of The Evidence Against Robinson on Count One.

The Court sentenced ROBINSON to ten years on Count One and ten years on Count Two, to run concurrently [C. Tr. 28].

Since the evidence on Count Two was sufficient to convict ROBINSON, the Court need not inquire into the sufficiency of the evidence on Count One.

Danziger v. United States, 161 F. 2d 299, 301 (9th Cir., 1947), cert. den. 332 U. S. 769;

Cohen v. United States, 201 F. 2d 386, 389 (9th Cir., 1953), cert. den. 345 U. S. 951;

Brandon v. United States, 190 F. 2d 175, 176 (9th Cir., 1951);

Lowden v. United States, 187 F. 2d 484 (9th Cir., 1951).

IV.

The Trial Court Did Not Commit Reversible Error in Limiting Cross-Examination on the Question of Credibility.

Appellants state that "the Court restricted the cross-examination of the prosecution witness [Mr. Cammack] concerning his relations with police officials and the treatment he had been getting while in the custody of the police [Reporter's Transcript, pp. 82, 86]." (App. Br. p. 11.)

To put this statement in proper perspective the Court should look at the liberal cross-examination permitted the defense attorneys.

They were permitted to bring out:

That Cammack finished serving a County Jail sentence for using narcotics on November 19 or 20, 1957 and was immediately arrested on a Federal narcotics charge [Tr. 58-59].

That he met Malcolm Richards, a Federal narcotics agent, after his arrest on the Federal charge [Tr. 58].

That he had served time in San Quentin on a narcotics charge [Tr. 70].

That he was a narcotics addict [Tr. 58-59, 71].

That Richards or some other officer said something to him "about working for them" [Tr. 59, 72].

That Cammack said he would set up some arrests [Tr. 74].

Whether the agents promised to talk to the Probation Officer or the United States Attorney or do anything else to help him [Tr. 60].

Whether he was promised leniency if he made a case on Robinson [Tr. 77].

That he knew bail in Federal narcotics cases was high [Tr. 71-72].

That he knew sentences in Federal narcotics cases were lengthy [Tr. 74].

That he knew if he worked for the Government he would get out on his own recognizance [Tr. 73].

That he was released O. R. on November 20, 1957 on condition that he "cooperates and set somebody up" [Tr. 62].

That he was picked up by the Los Angeles Police Department on January 16, 1958 (apparently on the Federal

charge) and remained in custody until March 3, 1958 [Tr. 79-80, 90].

That he pleaded guilty around February 10, 1958 and was sentenced to eight years on March 3, 1958 [Tr. 58, 79, 90].

Whether the sentencing judge made any reference to reconsideration after ROBINSON's case was over [Tr. 78].

That Federal narcotics agents visited him in jail once before he was sentenced and once afterward [Tr. 66].

Whether they talked to him on the first visit about the possible sentence he could get [Tr. 66-67].

Whether anything was said about testifying against LOWE and ROBINSON [Tr. 67].

Whether they talked about his being picked up after being out O. R. [Tr. 84].

That one of the agents left him "a couple of dollars" for cigarettes [Tr. 67-68, 82-83].

Whether he was asked on the second visit if he would like to get his sentence cut [Tr. 69].

Whether he knew about the sixty-day rule for modifying sentences [Tr. 77].

That he got two more dollars [Tr. 85].

That he had conversations with the United States Attorney's Office or other members of the law enforcement agency "last Monday and Tuesday" (April 28 and 29, 1958) [Tr. 93-94].

Whether they talked about "what would happen so far as recommendation on your behalf" [Tr. 94].

Whether he told them he was no longer interested in testifying [Tr. 94].

Whether any promises were made to him at these meetings [Tr. 95].

Whether he wanted to testify [Tr. 95].

Despite the wide latitude of the cross-examination, appellants now apparently claim that the Court committed prejudicial error on two occasions in limiting inquiry into the two-dollar loans. Appellants allege the first error is contained in the following testimony, relating to the agents' visit before sentence:

> "Q. You just asked him [Agent Landry] for a couple of dollars, is that right? A. That is right.
>
> Q. He is just a friend of yours? A. Yes, he is.
>
> Q. I see. You had been in jail before and you had borrowed money from other officers before, is that it? A. Yes, I have.
>
> Q. This was standard procedure so far as you are concerned, is that right?
>
> Mr. Johnson: Objection, your Honor. This is all immaterial.
>
> The Court: I will sustain the objection.
>
> Mr. Umann: All right" [Tr. 82].

Appellants allege the second error is contained in the following testimony, relating to the agent's visit after sentence.

> "Q. You got it [the two dollars] at the gate right there in the County Jail, in the attorney room? A. Yes.
>
> Q. And you knew this was unusual, a special privilege, didn't you?
>
> Mr. Johnson: Objection.
>
> A. No, I didn't.
>
> Mr. Umann: Oh, you didn't know that?

The Court: Yes, I will sustain the objection. Strike out the answer.

Mr. Umann: All right" [Tr. 85-86].

Appellants state:

> "While it is true that the trial court ordinarily has discretion in limiting the scope of cross-examination, a different situation arises when some promises of leniency has been made to the prosecution witness and the cross-examination then goes to the special matter effecting the credibility of the witness,"

citing *District of Columbia v. Clawans,* 300 U. S. 617, 632 (1936). (App. Br. p. 11.) One look at that case shows that it does not so hold. There, the respondent was convicted in the District of Columbia police court for engaging without a license in the business of second-hand personal property, to wit, the unused portions of railway excursion tickets. The Court said:

> "Although we conclude that respondent's demand for a jury trial was rightly denied, there must be a new trial because of the prejudicial restriction, by the trial judge, of cross-examination by respondent. The testimony of five prosecution witnesses was the sole evidence of the acts of respondent relied on to establish the doing of business without a license. These acts were the sale by her, on each of three occasions, to one or another of the witnesses, of the unused portion of a round trip railway passenger ticket from New York to Washington. Three of the five, a man and his wife and another, were employed by the Railroad Inspection Company as investigators. The other two were company police of the Baltimore & Ohio Railroad. All were private police or detectives, apparently acting in the course of their private employment. Common experience

teaches us that the testimony of such witnesses, especially when uncorroborated, is open to the suspicion of bias, see *Gassenheimer v. United States,* 26 App. D. C. 432, 446; *Moller v. Moller,* 115 N. Y. 466, 468; 22 N. E. 169; *People v. Loris,* 131 App. Div. 127, 130; 115 N. Y. S. 236; *Sopwith v. Sopwith,* 4 Sw. & Tr. 243, 246-7; Wigmore, Evidence (2d ed. 1923) §§949, 969, 2062, and that their cross-examination should not be curtailed summarily, see *State v. Diedtman,* 58 Mont. 13, 24; 190 Pac. 117, especially when it has a direct bearing on the substantial issues of the case.

"The defense was a suggested mistaken identity of respondent and an alibi, that at the times mentioned she was confined to her bed by illness, at her home in Newark, New Jersey. A number of questions on cross-examination by respondent were aimed at showing mistaken identity and at testing credibility. She asked one witness whether respondent had been pointed out to him. She asked another whether he had any trouble in 'knowing' the respondent at the trial, and whether he had seen her before the date of the alleged sale of tickets to which he testified. All these questions were excluded, as were others which were proper, since they might have established contradiction in the testimony of the witnesses for the prosecution.

"Other questions, which were relevant to the issue and obviously proper tests of credibility, were excluded. The woman witness had testified that one of the sales took place in the presence of her husband, and of the two railroad police witnesses. On cross-examination she could not remember whether anyone beside her husband was present. Yet respondent was not permitted to ask the husband whether the railroad police witnesses were known to

him or to ask one of the latter whether he knew the husband and wife before the date of the alleged sale. The court instructed one of the police officers not to answer the question whether the husband had come to Washington by prearrangement. Like questions addressed to the husband and his wife were excluded. The respondent was similarly prevented from making inquiries as to corroborative detail, such as the time of day when the witnesses arrived in Washington on the dates of the alleged sales, and the place of residence of a witness, see *Alford v. United States,* 282 U. S. 687. In the circumstances of the case, these questions may have had an important bearing on the accuracy and truthfulness of the testimony of the prosecuting witnesses. We do not stop to give other examples of the summary curtailment of all inquiry as to matters which are the appropriate subject of cross-examination.

"The extent of cross-examination rests in the sound discretion of the trial judge. Reasonable restriction of undue cross-examination, and the more rigorous exclusion of questions irrelevant to the substantial issues of the case, and of slight bearing on the bias and credibility of the witnesses, are not reversible errors. But the prevention, throughout the trial of a criminal case, of all inquiry in fields where cross-examination is appropriate, and particularly in circumstances where the excluded questions have a bearing on credibility and on the commission by the accused of the acts relied upon for conviction, passes the proper limits of discretion and is prejudicial error. See *Alford v. United States, supra.*"

Thus, *Clawans* affirms the general rule that the extent of cross-examination rests in the sound discretion of the trial judge and only holds that summary curtailment of all

inquiry into appropriate fields is prejudicial error. Can it be said that the Court curtailed all inquiry into Cammack's relations with police officials and the treatment he received from them? The Government thinks not.

Appellants further state:

> "As to this type of situation [where a promise of leniency has been made to the prosecution witness], the courts have consistently held that great latitude should be allowed in the cross-examination to test a witness's motives for testifying as bearing directly upon his credibility. *Fischer v. United States,* 237 F. 2d 99." (App. Br. p. 11.)

The Government believes that great latitude was allowed.

Appellants also state: "It is, therefore, error to shut off a cross-examination of the prosecution's witness upon the question of any promised or expected favorable treatment," citing *Sandroff v. United States,* 158 F. 2d 623 (6th Cir., 1946). (App. Br. p. 12.) That case is not in point. There, Charles Ginns, a Government witness, had been named as a co-conspirator, but not as a defendant, in an indictment charging violation of the Emergency Price Control Act. On cross-examination he was asked: "When were you offered immunity as to this indictment?" The Court sustained an objection. The cross-examiner immediately asked: "Were you offered immunity in this case?" The witness replied, "No." The cross-examiner countered, "You say that notwithstanding the fact you were not named as a defendant in the indictment?" The United States Attorney objected. Defense counsel stated that he sought to find out "for what reason and under what circumstances" he had not been indicted. The Court sustained the objection. Later, in cross-examining both

Charles Ginns and Jack Ginns, who was also named as a co-conspirator but not as a defendant, the defense counsel asked whether they had paid any damages to the Government as a result of the conspiracy. Defense counsel stated he expected to show that the one year statute on a civil action by the Government for many thousands of dollars had been allowed to run. The trial court sustained objections to these questions. The Appellate Court said:

> "In our judgment, the district court committed reversible error: in the first instance, in shutting off the cross-examination of Charles Ginns upon the question of promised or expected immunity; and, later, in refusing to permit his cross-examination upon the tendered subject matter pertaining to why he and his son, Jack Ginns, who, though named as coconspirators *in pari delicto* with Sandroff, had not been included as defendants in the indictment. The two Ginns were the chief and indispensable Government witnesses in the prosecution of Sandroff and his company. In such circumstances, it was highly important that latitude be allowed in cross-examination to test their motives for testifying against Sandroff as bearing directly upon their credibility. The district court emphasized its error by declaring in the presence of the jury that it was incompetent, irrelevant and wholly foreign to the issues in the case to show why Charles Ginns had not been included as a defendant in the indictment.
>
> "The decision and opinion of this court in Farkas v. United States, 6 Cir., 2 F. 2d 644, 647, is directly in point, and clearly indicates that the judgment below must be reversed and the case remanded for retrial. The necessity for this course is apparent from the following quotation from the opinion: 'The prosecuting witnesses, before the time of the trial, had pleaded

guilty to an indictment in the federal court; the verdict of guilt or innocence in the instant case depended primarily upon their credibility as against that of defendant who testified in denial of the demands and threats. *As bearing upon their credibility, motive for false accusations, as well as bias, was vitally relevant, and testimony tending to show such motive was entirely competent. Concedely promises of immunity are admissible; they are, however, rarely made.* Inasmuch as the question involved is the motive for testifying falsely and therefore the state of mind of the prosecuting witnesses, the relevant evidence is not alone the acts or attitude of the district attorney but anything else that would throw light upon the prosecuting witnesses' state of mind. *It is therefore entirely proper, either by cross-examination of the witness himself, or otherwise, to show a belief or even only a hope on his part that he will secure immunity or a lighter sentence, or any other favorable treatment, in return for his testimony, and that, too, even if it be fully conceded that he had not the slightest basis from any act or word of the district attorney for such a belief or hope.* The fact that despite a plea of guilty long since entered, the witness had not yet been sentenced, is proper evidence tending to show the existence of such hope or belief.

"The trial judge, although at one time during the taking of testimony he had so ruled, later sustained the objection to similar testimony, and finally not only refused an instruction that the jury might consider the fact of the delayed sentence as bearing on such hope, but expressly instructed counsel that they must not argue the matter as affecting the motives of the witnesses.

" '*In our judgment, this was such error as to compel a reversal in* the instant case. *Stevens v. People,*

215 Ill. [593,] 601, 74 N. E. 786; *State v. Kent,* 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686.' [Italics supplied.]

"In Alford v. United States, 282 U. S. 687, 692, 693, 694, 51 S. Ct. 218, 219, 75 L. Ed. 624, the Supreme Court held that the defense had the right to show by cross-examination that the testimony of a prosecuting witness was affected by fear, or favor growing out of his detention, and that it was immaterial whether he was in custody because of his participation in the transactions for which the defendant was indicted or for some other offense. The ruling of the trial court, cutting off *in limine* all inquiry as to whether his testimony was biased 'because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution,' was held to be an abuse of discretion and to constitute prejudicial and reversible error. Farkas v. United States, *supra,* was cited three times in the opinion in the Alford case. Mr. Justice Stone (afterwards Chief Justice) pointed out that it is the essence of a fair trial that reasonable latitude be given a cross-examiner, and asserted: 'To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.' *Cf.* Moyer v. United States, 9 Cir., 78 F. 2d 624, 630. See King v. United States, 5 Cir., 112 F. 988, 995, 996, for discussion of the wide latitude permitted in the cross-examination of witnesses in criminal cases. The authorities cited by Government counsel are not considered to be in conflict with the reasoning in the authorities which impel us to reverse and remand this

case. Ramsey v. United States, 6 Cir., 268 F. 825; Beach v. United States, 80 U. S. App. D. C. 160, 149 F. 2d 837; Safford v. United States, 2 Cir., 252 F. 471; Barron v. United States, 1 Cir., 5 F. 2d 799, 804" (pp. 629-630).

Hence, *Sandroff* is another case where there was summary curtailment of all inquiry into promised or expected immunity.

Here, appellants were permitted to go into that subject in great detail. There was no error.

Appellants then say that: "The defense has more than a privilege of cross-examination, it has a *right* to show that the testimony of a prosecution witness was affected by fear or favor growing out of his detention," citing *Alford v. United States,* 282 U. S. 687 (1931). (App. Br. p. 12.) That case was discussed in *Sandroff, supra.* Suffice to say again, that *Alford* was a case where all inquiry in "identifying the witness with his environment" and all inquiry into custody by Federal authorities was excluded. Nothing of that sort occurred here.

Finally, appellants argue that: "It is only after the right of cross-examination has been" thoroughly and substantially "exercised that the allowance of further cross-examination becomes discretionary with the Court." (App. Br. p. 12.) Appellants cite *Touhy v. United States,* 88 F. 2d 930 (8th Cir., 1937). The Court there said:

> "We find no error in the refusal of the court to allow Epmeier, who had 'turned State's evidence,' to answer on cross-examination, 'what his (the witness') purpose was in testifying for the government.' It is plain that the question was unhappily framed and that technically it called for a conclusion; yet we think the refusal by the court to allow it to be an-

swered would have been error, but for the fact that this witness had already been cross-examined at great and excessive length as to what promises of benefit or immunity if any, had been made to him for pleading guilty and testifying for the government, and he had already said that while no such promises had been made, he 'hoped, but did not expect,' the court would take the matter of his testifying for the government into favorable consideration. We think in this situation the point made is ruled by what this court said in the case of Hartzell v. United States (C. C. A.) 72 F. (2d) 569, 585, thus: 'A defendant is entitled as a matter of right to have an opportnuity of fairly and fully cross-examining the witnesses appearing against him. A denial of this right is usually prejudicial error. It is only after the right of cross-examination has been substantially and thoroughly exercised that the allowance of further cross-examination becomes discretionary with the trial court. Heard v. United States (C. C. A. 8) 255 F. 829; Cossack v. United States (C. C. A. 10) 57 F. (2d) 506; Galindez v. United States (C. C. A. 1) 19 F. (2d) 352.'

"A similar contention is urged, that the trial court unduly curtailed and restricted the cross-examination of the witness Barry, a participant in the crimes charged, and who likewise testified for the government. In addition to his cross-examination exhaustively as to promisee of lenity or immunity, Barry was asked as to an alleged conversation he had had with two post office inspectors, whether 'there was any discussion of any other case under which you (the witness) might be indicted by the United States'? To this question an objection by the government was sustained, and this is urged as error. What has been said already largely applies to this contention. Be-

> sides, no offer of proof was made by appellant, so we do not know whether if the witness had been permitted to answer, such answer would have been of any help to appellant [Flowers v. United States (C.C.A.) 83 F. (2d) 78, 81]; nor can we take judicial notice that a post office inspector has any authority by law either to mete out punishment, or to grant immunity to criminals" (p. 934).

The Government stands four-square on the law in *Touhy*. However, the Government thinks that the facts in the instant case show that the right of cross-examination was "substantially and thoroughly" exercised. Thus, there was no error.

Appellants make one last statement based on *Farkas v. United States,* 2 F. 2d 644 (6th Cir., 1924). (App. Br. p. 12.) The relevant part of that opinion was set forth in *Sandroff, supra.* It is not in point for the same reason that *Sandroff* was not in point, namely, because there the appellant was not permitted to go into promised or expected immunity. Here they were.

V.

The Court Did Not Err in Admitting Rebuttal Evidence.

The important facts on this point are as follows:

On direct examination it was pointed out that ROBINSON had told Cammack at ROBINSON's house that "the reason he didn't say much on the telephone [was] because a friend of his had been convicted through a telephone conversation" [Tr. 47].

During the cross-examination of ROBINSON it was brought out that, although he knew Smokey Shannon, he did not mention the name to Cammack [Tr. 120].

The Government then recalled Cammack who testified that he had a conversation with Robinson about Smokey. He said Robinson told him "that was the reason he had me to come over to his house, because Smokey had been convicted through a telephone conversation, that he hadn't accepted any money or gave any money on narcotics" [Tr. 129].

The scope of rebuttal evidence is set forth in Wigmore on Evidence, Section 1873 (3rd Ed. 1940):

> "It is clear that the orderly presentation of each party's case would leave the proponent nothing to do, in his case in rebuttal, except to *meet the new facts* put in by the opponent in his case in reply. Everything relevant as a part of the case in chief would naturally have been already put in; and a rebuttal is necessary only because, on a plea in denial, new subordinate evidential facts have been offered, or because, on an affirmative plea, its substantive facts have been put forward, or because, on any issue whatever, facts discrediting the proponent's witnesses have been offered. To discriminate between the first of these classes and the opponent's testimony merely denying the same facts that the proponent's witness had originally affirmed, is no doubt often difficult, and it is then not easy to say whether the proponent's testimony in rebuttal might or might not as well have been put in originally; yet the principle involved is clear. Moreover, practical disadvantages that would result from abandoning the natural order of evidence are, first, the possible unfairness of an opponent who has justly supposed that the case in chief was the entire case which he had to meet, and, secondly, the interminable confusion that would be created by an unending alteration of successive fragments of each case which could have been put in at once in the beginning.

"Accordingly, it is well settled that, while the occasional difficulty of discrimination, and the frequency of inadvertent omissions and unexpected contests, add emphasis to the general principle of the trial Court's discretion (*ante*, § 1867), yet the usual rule will exclude *all evidence which has not been made necessary by the opponent's case in reply:*

"In applying this customary rule of order, however, certain distinctions must be noted:

* * * * * * * * *

"(2) . . . the evidence offered thus tardily may consist either in *new facts* which ought to have been put in before, or in a repetition (either by a new witness or by the same former witness) of *former facts already once evidenced.* The customary rule will equally forbid both. But, on the other hand, the principle of the trial Court's discretion will equally sanction either; though the reasons in a given instance for thus permitting a departure would differ in the two cases, since for the former an inadvertent omission might be a sufficient excuse, while for the latter a just cause would be found in the need of clearing up an obscurity or emphasizing a disputed point upon which substantial contest had not been anticipated; moreover, the danger of unfair surprise might be present in the former case, but could hardly exist in the latter case.

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"(4) *For matters properly not evidential until the rebuttal,* the proponent has a *right* to put them in at that time, and they are therefore not subject to the discretionary exclusion of the trial Court. Matters that should have been put in at first may by that discretion be refused later, because this is but the denial of a second opportunity. But matters of true

rebuttal could not have been put in before, and to exclude them now would be to deny them their sole opportunity for admission. Hence, while the trial Court's determination of what is properly rebutting evidence should be respected, yet, if its nature as such is clear, the proponent does not need the trial Court's express consent to admit it as involving a departure from the customary rule.

"This will always be the case for evidence offered to impeach the opponent's witnesses by way of moral character, bias, self-contradiction, or the like."

The Government's position is that the Court properly admitted Cammack's rebuttal testimony under two theories: (1) that it was proper exercise of the court's discretion in permitting evidence of former facts already once evidenced; and (2) that it was offered to impeach ROBINSON.

There is, of course, one other hurdle in connection with the impeachment theory: a witness cannot be impeached on a collateral matter. What is the test of collateralness? Let us turn to 3 Wigmore on Evidence, Section 1003 (3rd Ed. 1940):

"The common term for designating the line of exclusion is 'collateral'; *no contradiction,* we are told, *shall be permitted on 'collateral' matters.*

"But this term furnishes no real test. If it be asked what 'collateral' means, we are obliged either to define it further—in which case it is a mere epithet, not a legal test—or to illustrate by specific examples—in which case we are left to the idiosyncrasies of individual opinion upon each instance.

"The test that it dicted by the principle above explained, and the only test in vogue that has the qualities of a true test-definiteness, concreteness, and

ease of application—is that laid down in Attorney-General v. Hitchcock:* *Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?"*

This Circuit follows the Hitchcock rule.

Shanahan v. Southern Pac. Co., 188 F. 2d 564, 568 (9th Cir., 1951);

Herzog v. United States, 226 F. 2d 561, 565 (9th Cir., 1955);

Smallfield v. Home Insurance Company of New York, 244 F. 2d 337, 341 (9th Cir., 1957);

Cf. 3 Wigmore on Evidence Sec. 1003, fn. 3 (3rd Ed. 1940).

Using that rule, the rebuttal evidence was clearly admissible because it was matter which the prosecution could and did—without objection—prove as part of the Government's case. Also, it was a matter which was otherwise admissible on cross-examination and was admitted—without objection—to show a specific deficiency of the witness. See 3 *Wigmore on Evidence,* Sec. 1020 (3rd Ed. 1940).

VI.

A General Objection, if Overruled, Cannot Be Availed of on Appeal.

This principle is well established. Appellant's objection to the rebuttal evidence falls within the rule.

Noonan v. United States, 121 U. S. 393, 400 (1887);

District of Columbia v. Woodbury, 136 U. S. 450, 462 (1890);

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*1 Exch. 99.

Olender v. United States, 237 F. 2d 859, 866 (9th Cir., 1956, *cert. den.* 352 U. S. 982 (1957);

Bank of Italy v. F. Romeo & Co., 287 Fed. 5, 9 (9th Cir., 1923).

VII.

Any Errors Should Be Disregarded.

If any errors were made they did not affect substantial rights and should be disregarded.

F. R. C. P. 52(a).

Conclusions.

1. The evidence was sufficient to convict ROBINSON on Count Two.

2. The Court need not inquire into the sufficiency of the evidence on Count One.

3. The trial Court did not commit reversible error in limiting cross-examination on the question of credibility.

4. The trial Court did not err in admitting rebuttal evidence.

5. If there were any errors they did not affect substantial rights and should be disregarded.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division,

ROBERT D. HORNBAKER,
Assistant U. S. Attorney,

Attorneys for Appellee.